Nos. 90-1266, 90-1262

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

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ENVIRONMENTAL PROTECTION AGENCY,
*Petitioner,*

v.

STATE OF OKLAHOMA, *et al.*,
*Respondents.*

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STATE OF ARKANSAS, *et al.*,
*Petitioners,*

v.

STATE OF OKLAHOMA, *et al.*,
*Respondents.*

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**On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

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## BRIEF OF THE ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES, THE ARKANSAS MUNICIPAL LEAGUE, THE NEW MEXICO MUNICIPAL LEAGUE AND THE NORTH CAROLINA LEAGUE OF MUNICIPALITIES AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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## BRIEF OF THE ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES, THE ARKANSAS MUNICIPAL LEAGUE, THE NEW MEXICO MUNICIPAL LEAGUE AND THE NORTH CAROLINA LEAGUE OF MUNICIPALITIES AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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The Association of Metropolitan Sewerage Agencies, the Arkansas Municipal League, the New Mexico Municipal League and the North Carolina League of Municipalities submit this brief as *amici curiae* in support of the petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit in *Oklahoma* v. *EPA*, 908 F.2d 595 (10th Cir. 1990).[1]

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[1] The petitioners and respondents in both cases have consented to the filing of this brief. The letters granting their consent have been filed with the Clerk of the Court.

## INTEREST OF THE AMICI CURIAE

The amici cities and associations strongly urge this Court to grant certiorari and review the decision of the Tenth Circuit because of the extraordinary impact this decision will have on cities and municipal treatment facilities throughout the country.

The amici associations represent cities and municipal sewerage authorities located all across the nation. In particular, the Association of Metropolitan Sewerage Agencies is a national non-profit association of 116 municipal sewerage agencies and special purpose sewerage districts. Its member agencies are responsible for managing nearly all of the nation's large publicly owned treatment works ("POTWs") serving a combined population of over 80 million people.

The Arkansas Municipal League, the New Mexico Municipal League and the North Carolina League of Municipalities are voluntary associations of municipalities in the respective states that are organized to serve municipal governments and represent their interests before the legislative, executive and judicial branches of the state and federal governments. The Arkansas Municipal League has 479 municipal members, the New Mexico Municipal League is composed of all 99 municipalities in that state, and the North Carolina League of Municipalities has a membership consisting of 496 municipalities. The municipalities in all of these states operate municipal wastewater treatment plants that must discharge effluent into interstate waterways.

Municipalities are directly affected by the Tenth Circuit's decision because they build and operate municipal wastewater treatment plants. Just as every city needs a source of water, so too must every city provide a system for collecting and removing the wastewater used by residents. Municipal treatment plants treat and remove pollutants from the wastewater generated by residential, commercial and industrial buildings in almost

every municipality in the nation. Over time, these treatment plants have become more and more sophisticated and expensive to build, as the nation strives for cleaner water.

Every municipal wastewater treatment plant must apply for and obtain a discharge permit under the National Pollutant Discharge Elimination System ("NPDES") of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1387. Over 16,000 municipal treatment plants are currently operating with approved NPDES permits. A large number of new and upgraded facilities will be needed by the end of this century to meet the goals of the CWA. New plants are constantly being planned and built, with each new facility typically involving the expenditure of millions of dollars by federal, state and local governments. Total expenditures on new and upgraded municipal treatment plants are expected to exceed $100 billion by the year 2000. Thus, applications for new and renewed permits by municipal treatment plants comprise a substantial portion of the NPDES permitting programs of EPA and the states.

The Tenth Circuit's decision will make it significantly more difficult for municipal treatment plants to receive new or renewed discharge permits under the CWA. The court's decision imposes two new stringent conditions on the approval of NPDES permits for municipal treatment plants and other facilities. First, the court has construed the CWA as requiring facilities to ensure compliance with the water quality standards of downstream states, in addition to the standards of the source state. Second, no new permit can issue to a facility that is upstream from an existing violation of a relevant water quality standard. Since many municipal treatment plants discharge effluent into streams that cross state borders or which flow into interstate waterways, these new requirements for NPDES permits will result in additional restrictions on permits for such facilities. In many cases,

a new municipal treatment plant may be denied a permit outright. For example, the instant case involved the court's denial of a discharge permit issued to the new municipal treatment plant constructed by the City of Fayetteville, Arkansas.

The court's first holding on the interstate application of water quality standards undermines the careful balancing of the interests of upstream and downstream states established by the CWA. Both upstream and downstream states have legitimate interests in the control of water quality on interstate waterways. However, by giving downstream states absolute power to regulate out-of-state sources, the court has adopted a one-sided approach that will frequently produce unfair and unreasonable results. The court's decision will provoke more frequent and more intractable water quality disputes between states, with municipal dischargers often being caught in the middle and denied a discharge permit.

The court's second holding requiring a permit ban upstream from existing violations is an extreme solution to the problem of water quality violations that lacks any legal basis in the CWA. When combined with the court's first holding, the permit ban requirement will cause severe disruption of the CWA's program of building new municipal treatment plants. Federal, state and municipal governments have invested an enormous amount of financial resources in the construction of new municipal treatment plants. Large numbers of new facilities still need to be constructed to meet the water quality goals of the CWA. Many of these new plants are already under construction, and many more are being planned, with total expenditures exceeding several billion dollars per year. The Tenth Circuit's decision will tremendously confuse and disrupt the planning process for these new facilities and will create substantial doubt about whether many of the new facilities can ultimately receive their discharge permits.

Moreover, the court's decision will be counter-productive with respect to improving water quality. The decision will result in the denial of discharge permits to many new municipal wastewater treatment plants. However, these new facilities would have contributed to the improvement of water quality by providing more advanced treatment of wastewater. Thus, by blocking the permit approvals of new municipal dischargers, the Tenth Circuit's decision will end up doing more harm than good to the goal of improving the nation's water quality.

For these reasons, the amici parties representing cities and municipal treatment facilities that will likely be harmed by the Tenth Circuit's decision have a substantial and direct stake in the present case, and respectfully request this Court to grant certiorari.

## STATEMENT

This case presents two issues of fundamental importance to the administration of the CWA. In overturning the NPDES permit issued by EPA to the new Fayetteville municipal wastewater treatment plant, the Tenth Circuit imposed two new conditions on the approval of permits under the CWA.[2] Both of the new conditions will dramatically change the requirements for obtaining NPDES permits, and in many cases may result in the denial of a permit altogether.

The first condition imposed by the court is that all discharges must strictly comply with the water quality standards of all downstream states, in addition to the standards of the source state. 908 F.2d at 615. Although the Tenth Circuit could point to no other judicial opinion

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[2] The Tenth Circuit overturned the Fayetteville permit based on these two conditions, even though the court did not disturb EPA's findings that the facility's discharge would fully comply with all federally-approved Arkansas water quality standards and in fact would not even have a detectable effect on Arkansas or Oklahoma water quality.

that had required compliance with downstream state standards, the court concluded that the CWA mandated such a requirement. EPA and state permitting agencies were left with no flexibility or discretion to apply or interpret downstream state standards. Since the Fayetteville facility is located approximately forty miles upstream from the Oklahoma border, the court held that the facility's discharge must comply with Oklahoma's federally-approved water quality standards.

The second condition imposed by the Tenth Circuit for approval of an NPDES permit is even more severe. The court required a permitting agency to deny outright any new permit application for a facility situated upstream from an existing violation of a relevant water quality standard. 908 F.2d at 616. In the instant case, the court found that the Oklahoma waterway into which half of the Fayetteville effluent would eventually flow had a preexisting violation of Oklahoma water quality standards. This existing violation could not be attributed to the Fayetteville discharge, since the violation preceded the discharge. The court nevertheless concluded that the statutory scheme required EPA to deny the permit, even though it was unable to find any specific provision in the CWA that supported its new prerequisite for issuing a permit.

## REASONS FOR GRANTING THE WRIT

### I. THE TENTH CIRCUIT'S DECISION DISRUPTS THE DELICATE BALANCE BETWEEN THE INTERESTS OF UPSTREAM AND DOWNSTREAM STATES AND WILL INCITE INTERSTATE DISPUTES OVER WATER QUALITY.

By requiring point sources to comply strictly with the water quality standards of all downstream states, regardless of how unfair or unreasonable the consequences, the Tenth Circuit's decision gives downstream states unlimited power to regulate out-of-state sources. The adoption of this one-sided approach will disrupt the careful balancing of the interests of upstream and downstream states established by the CWA. Plenary review by this Court is necessary to restore the more balanced approach, which recognizes the legitimate interests of both upstream and downstream states, that was created by Congress for resolving interstate water quality disputes.

#### A. The Problem Of Interstate Water Pollution Requires An Equitable Approach That Considers The Legitimate Interests Of Both Upstream And Downstream States.

A fair and reasonable approach that considers the legitimate interests of both upstream and downstream states is needed to resolve interstate water quality disputes. As even a quick glance at a map of the United States will attest, most streams in the lower forty-eight states either cross state boundaries or flow into interstate waterways that span two or more states. There is an inherent tension between the geographical fact that waterways are predominantly interstate and the political reality that water quality standards are established on a state-by-state basis under the CWA. CWA § 303, 33 U.S.C. § 1313. When neighboring states adopt inconsistent water quality standards for adjoining segments of the same waterway, full-scale state-versus-state disputes

can erupt in which the legitimate interests of both downstream and upstream states are threatened.

The many important differences in economic, industrial, social, political, and geographical conditions among states inevitably result in different priorities and trade-offs when states establish their water quality standards. A regulatory approach that gives either upstream or downstream states unlimited power to impose their policy choices on adjoining states would result in unjust and unreasonable consequences. For example, if an upstream state were allowed to set its own water quality standards at any level it chose, it could potentially adopt very lax water quality standards in order to create what Congress referred to as a "pollution haven" and attract new industries.[3] While the benefits of lax standards may outweigh the costs to the upstream state, a downstream state would have to tolerate the increased pollution flowing across its borders without obtaining any of the economic benefits that accrue to the upstream state. Thus, giving upstream states unlimited power to adopt their own water quality standards may unfairly pollute the waters of a downstream state.

It would be equally unfair to allow a downstream state to impose unilaterally its policy choices on an upstream state. Yet this is exactly what the Tenth Circuit's decision requires, by forcing dischargers in an upstream state to ensure strict compliance with the water quality standards of a downstream state. A downstream state with very little economic activity on its portion of an interstate waterway could adopt very stringent water quality standards, perhaps even allowing zero discharges, without adversely affecting its own population or economic

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[3] *See* S. Rep. No. 370, 95th Cong., 1st Sess. 73 (1977), *reprinted in* 4 Senate Comm. on Environment and Public Works, Legislative History of the Clean Water Act of 1977, at 633, 706 (1978). As described below, Congress deliberately structured the CWA to prevent the establishment of such "pollution havens" by requiring states to comply with minimum federal standards.

prosperity. However, an adjoining upstream state that is more densely populated may suffer severe economic injury if it is required to comply with the downstream state's stringent water quality standards.

Regardless of whether the motivations of the downstream state are innocent or intentionally discriminatory, the effect on upstream states will be equally devastating. New industrial facilities may be denied permits, and many existing facilities may be forced to close. Municipalities in the upstream state may even be denied the right to provide modern sewerage service to their population. The downstream state would have unchecked power to dictate the level of population growth and economic development allowed in an upstream state, without having any incentive or reason to consider the legitimate social and economic interests of the upstream state.

Both of these one-sided approaches give too much weight to the interests of one state while almost completely disregarding the interests of the other. Such approaches would inevitably produce unfair and unreasonable results. Instead, the problem of interstate water pollution needs to be addressed by a more equitable approach that achieves a balance between the legitimate interests of both upstream and downstream states.

### B. The Clean Water Act Establishes A Careful Balance Between The Interests Of Upstream And Downstream States.

The provisions of the CWA, as interpreted by courts over the past decade, establish such a balance and protect downstream states from pollutants discharged by upstream sources in at least three ways. First, Congress specifically sought to prevent the establishment of "pollution havens" in upstream states by directing EPA to set national minimum criteria for the state water quality standards required under section 303, 33 U.S.C. § 1313, and the point source effluent limitations required under

section 301, 33 U.S.C. § 1311.[4] State water quality standards must be approved by EPA to ensure that they meet or exceed the federal criteria. CWA § 303(a), 33 U.S.C. § 1313(a).[5] The requirement that all waterways must meet the federally-established minimum criteria for water quality ensures that an upstream state will not be able to adopt inadequate water quality standards that leave the waters of a downstream state unprotected.

Second, the CWA provides a consultative mechanism whereby a downstream state can convey its concerns about upstream discharges to the permitting authority for the source state. If the source state is the permitting authority, it is required to provide an opportunity for a potentially affected downstream state to submit written recommendations with respect to the permit application. CWA § 402(b)(5), 33 U.S.C. § 1342(b)(5). The permitting state is then required to consider the downstream state's recommendations and notify the state if it does not accept the recommendations. *Id.*

Similarly, when EPA is the permitting agency, it must afford a downstream state that may be affected by a proposed discharge an opportunity to present its reasons for opposing the permit at a public hearing. CWA § 401(a)(2), 33 U.S.C. § 1341(a)(2). EPA must consider the downstream state's objections and determine whether additional limitations are necessary to protect

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[4] *See supra* note 3. For example, the federal criteria for water quality are designed to ensure that the designated uses of the waterway are achieved. CWA § 304, 33 U.S.C. § 1314.

[5] If a state's water quality standards are not consistent with EPA's criteria or otherwise defensible, and the state does not make the needed changes in a timely manner, EPA is required by the Act to promulgate adequate standards. Section 303(a), 33 U.S.C. § 1313(a). In addition, section 510, 33 U.S.C. § 1370, allows states to adopt stricter water quality standards that exceed the federal criteria, but these more stringent standards can only be applied against in-state dischargers. *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 328 (1981).

downstream water quality. While these provisions do not give a downstream state a veto power over permit decisions in an upstream state, *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 490 (1987), they do give the downstream state the right to be consulted and to have the permitting agency consider its views. If the objections of a downstream state are reasonable, there is a strong likelihood that the permitting agency will try to accommodate them in the permitting decision.

Finally, the CWA provides an opportunity for EPA to veto any state-issued permit that fails to adequately protect the water quality of a downstream state. If a state permitting agency declines to adopt the written recommendations of a downstream state to ameliorate the interstate effects of a proposed permit, EPA is given discretion to veto the state-issued permit. CWA § 402(d)(2)(A), 33 U.S.C. § 1342(d)(2(A). EPA's decision whether to veto the permit is discretionary, and federal courts have held that a decision not to veto the permit is unreviewable. *District of Columbia* v. *Schramm*, 631 F.2d 854, 861 (D.C. Cir. 1980). Thus, EPA is assigned the role of final arbitrator under the CWA to balance the competing interests of upstream and downstream states, and to block a permit issued by the upstream state that would impose an unreasonable burden on water quality in the downstream state.

### C. The Tenth Circuit's Holding Disrupts This Careful Balance Of State Interests And Will Unfairly Allow Downstream States To Impose Their Policy Choices On Upstream States.

The Tenth Circuit's decision completely changes the rules for resolving interstate water quality disputes under the CWA. While other courts have interpreted the CWA to carefully balance the legitimate interests of both upstream and downstream states,[6] the Tenth Circuit's deci-

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[6] *See, e.g., International Paper Co.* v. *Ouellette*, 479 U.S. 481 (1987); *City of Milwaukee* v. *Illinois*, 451 U.S. 304 (1981); *Illinois*

sion gives a downstream state absolute power to impose its water quality standards on upstream states, with no mechanism or mediator to prevent unreasonable or unjust results. The unlimited power of a downstream state to adopt water quality standards as strict as it wants under section 510, 33 U.S.C. § 1370,[7] combined with the Tenth Circuit's holding that gives a state the unconditional power to apply such standards extraterritorially against an upstream state, grant downstream states unchecked power to impose their standards on upstream states.

Prior to the Tenth Circuit's decision, downstream states had an advisory, but not a controlling, role in upstream permitting decisions. Thus, downstream states were compelled to negotiate and compromise with upstream states to reach mutually acceptable resolutions of potential interstate disputes over water quality. Under the Tenth Circuit's decision, downstream states will now have the right to block new permits in upstream states by imposing very stringent water quality standards. By giving downstream states absolute power over upstream states on matters of interstate water quality, the decision below eliminates the incentive for downstream states to reach negotiated solutions, and therefore will result in a dramatic increase in contested permit proceedings, litigation and economic warfare between states.[8]

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v. *City of Milwaukee*, 731 F.2d 403 (7th Cir. 1984), *cert. denied*, 469 U.S. 1196 (1985).

[7] Courts and EPA have taken the position that the Agency has no power to disapprove state water quality standards that are stricter than the minimum federal criteria. *See, e.g., Homestake Mining Co.* v. *EPA*, 477 F. Supp. 1279, 1284 (D.S.D. 1979).

[8] For example, in one state alone, the Tenth Circuit's decision is already being used to challenge the permit applications of the municipal treatment plants in the Arkansas cities of Siloam Springs, Springdale and Rogers. Conflicts over the right to use interstate waterways have unfortunately provoked frequent litigation among states in the past whenever the stakes are this high and no effective mechanism exists for mediating the competing interests of the affected states. *See, e.g., International Paper Co.* v. *Ouellette*, 479

The potential for unjust and unreasonable consequences —not to mention the widespread disruption described in Section II below—is enormous if the court of appeals' decision is allowed to stand. The CWA provides important safeguards to ensure that water quality standards do not impose unreasonable requirements on permit applicants. These safeguards will work as planned if the standard-setting agency has an incentive and a willingness to consider the ramifications of a proposed standard for all affected discharges and for all the affected population. The setting of water quality standards has always involved the balancing of economic and environmental considerations to improve water quality without causing undue economic and social hardship. *See, e.g.*, 48 Fed. Reg. 51,400 (1983). Since a state has a strong stake in the ability of in-state sources to serve and support its residents and to create new jobs, a state agency has an incentive not to set standards that are impossible or economically infeasible for such sources. However, a state has no such incentive to consider the feasibility of the standard for out-of-state sources, because there is no commonality of social and economic interests.

As one example of this potential for unreasonable consequences, the statutory scheme now permits states to revise their own water quality standards if attainment is not feasible because the standards "would result in substantial and widespread economic and social impact." 40 C.F.R. § 131.10(g)(6). However, a downstream state with a stringent water quality standard is unlikely to give adequate consideration to the economic or environmental impact of its standards on an upstream state, and therefore is unlikely to make accommodations when setting its standards, even when it would be appropriate to do so.

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U.S. 481 (1987) (water quality); *Colorado* v. *New Mexico*, 459 U.S. 176 (1982) (water quantity); *City of Milwaukee* v. *Illinois*, 451 U.S. 304 (1981) (water quality); *Nebraska* v. *Wyoming*, 325 U.S. 589 (1945) (water quantity); *New York* v. *New Jersey*, 256 U.S. 296 (1921) (water quality); *Kansas* v. *Colorado*, 206 U.S. 46 (1907) (water quantity).

Similarly, a state can grant variances from its own water quality standards to individual facilities that cannot meet a standard.[9] Again, a downstream state has very little incentive to consider the circumstances of an out-of-state facility and grant a variance when appropriate. Thus, the provisions built into the CWA to prevent the unreasonable application of water quality standards will not function properly to protect sources in upstream states if they are required to comply with downstream state standards.

In fact, the Tenth Circuit's decision will even enable downstream states to discriminate against out-of-state facilities and to otherwise block vital projects in upstream states. For example, a state could declare a segment of a waterway just inside its border to be an outstanding national resource water and apply very strict water quality standards that effectively foreclose any new economic development or population growth in upstream states along the waterway. At the same time, the state could adopt much less stringent standards for downstream segments that would allow unrestricted economic development within the downstream state. *See, e.g., City of Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978) (an example of one state discriminating against another with respect to pollution disposal).

Regardless of whether downstream states would themselves act unfairly, private parties, interest groups, business competitors and Indian tribes could all use the decision below in a comparable manner. This will become an increasingly difficult problem as more and more Indian tribes are recognized as "states" by EPA under the CWA and allowed to adopt their own water quality standards. CWA § 518, 33 U.S.C. § 1377. The proliferation of authorities that can set water quality standards that apply to a particular facility will create a complicated web of inconsistent regulations, which will make compliance by

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[9] *See* EPA, *Water Quality Standards Handbook* (Dec. 1983).

individual sources extremely difficult and would hinder, if not preclude, the issuance of many new permits.

It is therefore imperative for this Court to grant certiorari before the Tenth Circuit's decision creates any further disruption in the issuance of new permits and provokes additional interstate disputes and litigation.

## II. THE TENTH CIRCUIT'S IMPOSITION OF A PERMIT BAN UPSTREAM FROM EXISTING WATER QUALITY VIOLATIONS WILL CAUSE SEVERE DISRUPTION AND WILL ACTUALLY IMPAIR EFFORTS TO IMPROVE WATER QUALITY.

The Tenth Circuit's novel construction of the CWA to require a ban on new permits upstream from existing water quality violations will have unacceptable and unnecessary adverse economic and environmental consequences. Even though the Tenth Circuit itself conceded that its holding lacked an explicit basis in the CWA,[10] the court nevertheless proceeded to impose unilaterally a drastic new regulatory requirement on permitting agencies and permit applicants. Thus, plenary review by this Court is also needed to clarify the significance of existing water quality violations under the CWA and to prevent the widespread harm that will result from this aspect of the Tenth Circuit's decision.

The Tenth Circuit's permit ban holding was based on the court's determination that "common sense" required a ban on new permits in order to meet the goals of the CWA.[11] However, instead of imposing an absolute ban on new sources on waterways that are not currently attaining water quality standards, the CWA envisions

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[10] 908 F.2d at 633 (the court's holding requiring a permit ban "'lacks an *explicit* imprimatur' in the CWA").

[11] 908 F.2d at 631 ("Common sense dictates that a pollution control strategy designed to prevent, abate, and eliminate pollution would be subverted by allowing a new source of pollution on a currently polluted watercourse.").

a more equitable and less disruptive approach. States are required to allocate among all existing and new dischargers the total maximum daily load that a particular waterway can accept without exceeeding standards. CWA § 303(d), 33 U.S.C. § 1313(d). These maximum daily load allocations are to be completed in phases, based on the priority ranking the state assigns to each waterway within its borders. This more reasonable approach gives states the flexibility and time to achieve water quality standards without having to adopt a permit ban that will freeze economic growth and industrial development.

The permit ban required by the Tenth Circuit's decision, especially when extended to out-of-state upstream sources as a result of the court's first holding, threatens to disrupt one of the principal goals of the Clean Water Act—the construction of publicly-owned wastewater treatment plants. CWA § 101(a)(4), 33 U.S.C. § 1251 (a)(4). An enormous amount of public funds and long-term planning have been dedicated to the construction of these plants. By now creating major impediments to the ability of many of these plants to obtain NPDES permits, the Tenth Circuit's decision will wreak intolerable havoc for municipalities and permitting agencies.

EPA has estimated that it will cost some $108 billion by the year 2000 to construct the new municipal wastewater treatment plants that are needed to meet the requirements of the CWA.[12] Over 6000 new plants will have to be built, and over 5000 existing plants will have to be enlarged or upgraded.[13] Each facility will cost millions of dollars on average, and will take eight to ten years to construct.[14] The planning or construction for many of these new facilities is already well underway.

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[12] *Amending the Clean Water Act: Hearings on S. 53 and S. 652 Before the Subcomm. on Environmental Pollution of the Senate Environment and Public Works Comm.*, 99th Cong., 1st Sess. 309 (1985).

[13] *Id.* at 299.

[14] *Id.* at 300.

The design, specifications, and location of these new municipal facilities have been carefully selected to, among other things, ensure compliance with state water quality standards. The Tenth Circuit's decision may now impose significant new requirements on these facilities in order to ensure compliance with downstream water quality standards. Newly constructed facilities may be required to undertake major and expensive design changes or changes in the proposed method of discharge. Even worse, many of the facilities now being planned or constructed may be denied a permit altogether under the Tenth Circuit's decision if they happen to be located upstream from an existing water quality violation. These new facilities will have no control or certainty over whether they will eventually be issued a permit, since their fate will now be determined by the activities of downstream dischargers in any downstream state.

In addition, the Tenth Circuit's decision will create administrative disruptions and burdens in the permit process. The court's new requirements for permit approvals will increase the already substantial backlog of permit applications and permit renewals. As of 1985, there was a nationwide backlog of over 25,000 permit renewals.[15] By further increasing this permit backlog, the Tenth Circuit's decision will create additional uncertainty and delays for the approval of municipal treatment plant permits.

Furthermore, permit applicants will now be required to demonstrate that there are no pre-existing water quality violations downstream from their proposed discharge. Municipalities will therefore be required to spend scarce resources gathering the additional data on downstream water quality that will be required to accompany permit applications. Finally, the increased risk of litigation that will be created by the extreme and unreasonable consequences of the court's holdings will further burden mu-

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[15] *Id.* at 437.

nicipalities. The Tenth Circuit's decision will therefore cause major disruptions in the planning and permitting procedures of many new municipal treatment facilities, and will result in staggering economic and social disasters for those municipalities that are denied a permit altogether for their newly constructed facilities.

Moreover, the Tenth Circuit's supposed "solution" to water quality violations will be counter-productive and will in many cases worsen rather than improve water quality. In particular, denying permits to new municipal wastewater treatment plants upstream from existing violations will not improve water quality; it will likely make it worse. Municipal wastewater treatment plants do not themselves generate pollution; instead they remove pollutants from wastewater generated by other sources. Accordingly, prohibiting permits for new municipal wastewater plants hinders rather than helps the improvement of water quality. For example, a recent study by EPA found that the construction or upgrading of municipal treatment plants generally resulted in substantial improvements of downstream water quality.[16] The Tenth Circuit's holding is therefore not only legally indefensible as shown by the certiorari petitions, but it is extremely short-sighted on the very policy grounds the Tenth Circuit used to justify its decision.[17]

Plenary review by this Court is urgently needed to prevent the severe and unreasonable consequences that will result from the Tenth Circuit's decision.

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[16] EPA, *Before-and-After Case Studies: Comparisons of Water Quality Following Municipal Treatment Plant Improvements* (EPA-430/9-007, May 1984).

[17] The new $40 million, state-of-the-art municipal treatment plant built by the City of Fayetteville is a case in point. The facility has been denied a permit by the Tenth Circuit, even though it will result in a marked improvement in environmental quality compared to the old treatment facility it was intended to replace.

## CONCLUSION

For the foregoing reasons, the Court should issue a writ of certiorari to review the decision of the Tenth Circuit.

Respectfully submitted,

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